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NO. 86-1534

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

RALPH A. APPLEGATE,

Petitioner,

v.

DOBROVIR, OAKES & GEBHARDT,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENT

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STATEMENT OF FACTS

Petitioner Ralph A. Applegate ("Mr. Applegate"), a citizen of Ohio, brought a diversity action against his former District of Columbia attorneys, Respondent Dobrovir, Oakes & Gebhardt ("the law firm"). Mr. Applegate alleged that the law firm had negligently represented him in complex federal court litigation and had fraudulently coerced him into agreeing to settle his claims.

After the case was transferred from Ohio to the United States District Court for the District of Columbia, extensive discovery was conducted. At no time did Mr. Applegate ever identify an expert witness to testify as to the applicable standard of care owed by the law firm, a necessary element of his prima facie case under both Ohio and District of Columbia law. Accordingly, the law firm moved for summary judgment arguing, in rele-

vant part, that because Mr. Applegate had no expert witness who would testify as to the applicable standard of care owed by an attorney, the law firm was entitled to judgment as a matter of law.

Relying upon the applicable District of Columbia and Ohio precedents, United State Magistrate Arthur L. Burnett, Sr. recommended that summary judgment be entered in favor of the law firm. The United States District Court for the District of Columbia (Oberdorfer, J.) considered the law firm's motion de novo and granted summary judgment.1/

Judge Oberdorfer agreed with the Magistrate's conclusion that both District of Columbia and Ohio law provide that "in legal ... malpractice cases, expert testimony

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1/The Memorandum Opinion Report and Recommendation of the Magistrate appears as an Appendix to the trial court's opinion. Applegate v. Dobrovir, Oakes & Gebhardt, 628 F. Supp. 378 (D.D.C. 1985).

proving the applicable standard of care is an essential element of plaintiff's prima facie case".

In his scattershot appeal, Mr. Applegate argued for the first time, inter alia, that William A. Dobrovir, Esquire, a partner in the law firm, could serve as his sole expert witness. On January 22, 1987, a panel of the United States Court of Appeals for the District of Columbia Circuit, in a per curiam opinion, rejected Mr. Applegate's arguments and affirmed the District Court in all respects. On February 27, 1987, the Circuit Court of Appeals unanimously denied Mr. Applegate's petition for rehearing en banc. Petitioner filed the instant petition for a writ of certiorari on March 23, 1987.

REASONS FOR DENYING THE WRIT

The Petition does not raise a question of sufficient import to warrant this Court's review on certiorari. Three distinct reasons support a denial of the writ.

First, Mr. Applegate apparently argues that the federal circuit court failed to properly construe and apply the adverse witness statutes of Ohio and the District of Columbia, which statutes he admitted on appeal were not in conflict.[2/] Such a limited issue of local law does not raise any federal question, let alone an important question of federal law which this Court should now settle. As this Court has recognized, a "challenge to a state-law determination by the Court of Appeals will

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2/On appeal, Mr. Applegate also argued that District of Columbia law would likely control this issue, even if a choice of laws question existed, under a "substantial interest" analysis. Brief for Appellant at 38.

rarely constitute an appropriate subject of this Courts review." Haring v. Posise, 462 U.S. 306, 314 n.8 (1983).

Second, the state law issue framed by Mr Applegate is of extremely narrow application. That issue could affect only the limited class of suits brought against attorneys where an essential element of a prima facie care of professional negligence -- expert evidence establishing the applicable standard of care -- can allegedly be garnered only from a defendant lawyer. Such a circumscribed issue, while of potential concern to former clients seeking to question the manner in which their lawyers litigate complex claims, is plainly not of such special importance as to merit review by this Court. See, Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955).

Finally, the District of Columbia Circuit considered and determined the proferred state law issue here in a manner

which plainly did not contravene local law. The federal court of appeals expressly affirmed the entry of summary judgment for the reasons set forth in the district court's decision. It also explicitly applied District of Columbia law, Eibl v. Kogan, 494 A.2d 640 (D.C. 1985), to hold that petitioner's failure to proffer the required independent expert testimony as to the applicable standard of attorney care was fatally defective. That determination did not conflict with Ohio case law since Oleksiw v. Weidener, 207 N.E.2d 375 (Ohio 1965), a medical malpractice/informed consent case, did not address the need for independent expert proof on the standard of care. Oleksiw only held that a defendant doctor could be called as an adverse witness to provide relevant testimony, including expert opinion. Since the decision below reached a clearly reasonable and permissible result under local law, no significant question has

been posed for this Court to determine. See, Huddleston v. Dwyer, 322 U.S. 232, 237 (1944).

CONCLUSION

For all of the foregoing reasons, Respondent Dobrovir, Oakes, & Gebhardt prays that this Honorable Court deny Petitioner Ralph A. Applegate's petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing were mailed, postage prepaid, this 20th day of April, 1987, to:

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David P. Durbin